IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-603

ALABAMA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

BRIEF FOR THE PETITIONERS IN NO. 76-619

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

(Counsel listed on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

COUNSEL FOR PETITIONERS

UTAH POWER & LIGHT COMPANY
PUBLIC SERVICE COMPANY OF COLORADO
COLORADO-UTE ELECTRIC ASSOCIATION, INC.
PLATTE RIVER POWER AUTHORITY
CHEYENNE LIGHT, FUEL AND POWER COMPANY

GERRY LEVENBERG
THOMAS A. KAROL

LEONARD, COHEN AND GETTINGS
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

UTAH POWER & LIGHT COMPANY

SIDNEY G. BAUCOM
VERL R. TOPHAM
P. O. Box 899
Salt Lake City, Utah 84110

PUBLIC SERVICE COMPANY OF COLORADO
CHEYENNE LIGHT, FUEL AND POWER COMPANY

BRYANT O'DONNELL

KELLY, STANSFIELD & O'DONNELL
550 Fifteenth Street
Denver, Colorado 80202

PLATTE RIVER POWER AUTHORITY

MOSES, WITTEMYER and HARRISON, P.C.
250 Arapahoe Avenue
Boulder, Colorado 80302

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

GIRTS KRUMINS

P.O. Box 1149
Montrose, Colorado 81401

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-603

ALABAMA POWER COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

BRIEF FOR THE PETITIONERS IN NO. 76-619

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPINION BELOW

The opinion of the Court of Appeals (A. 39a-90a)[1] is reported at 540 F.2d 1114.

JURISDICTION

The judgment of the Court of Appeals (Pet. No. 76-529, App. 91a) was entered on August 2, 1976. This petition was filed November 1, 1976, and was granted April 4, 1977.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions are set forth in Appendix A, *infra*. The regulations are set forth in the joint appendix, A.206a-291a.

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands within their jurisdiction.

---

[1] References to the joint appendix filed with this Court pursuant to Rule 36 will be denoted "A.".

[2] The Court, in granting certiorari, consolidated this petition with other petitions, Nos. 76-529, 76-585, 76-594, 76-603, and 76-620.

STATEMENT

A. The Clean Air Act.

As amended in 1970, the Clean Air Act, 84 Stat. 1676, prescribes a comprehensive regulatory scheme for reducing emissions of certain pollutants into the ambient air. While the Act grants federal authorities certain powers of supervision and enforcement, it reserves to each State the "primary responsibility for assuring air quality within the entire geographic area comprising such State." § 107(a).[3]

Section 108 directs the Administrator of the Environmental Protection Agency (EPA) to list certain air pollutants, and thereafter issue air quality criteria for such air pollutants. For those air pollutants, § 109 (a) requires the Administrator to prescribe a national primary ambient air quality standard and a national secondary ambient air quality standard. National primary ambient air quality standards are "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator . . . allowing an adequate margin of safety, are requisite to protect the public health." § 109(b)(1). A national secondary ambient air quality standard is "a level of air quality the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence" of the particular air pollutant in the ambient air. § 109 (b)(2).

---

[3] Section references to the Act are used in the text; cross references to the United States Code citations appear in the Appendix, *infra*.

Each State is required to submit to the Administrator a "plan which provides for implementation, maintenance, and enforcement" of the national ambient air quality standards. § 110(a)(1). Section 110(a)(2) explicitly provides that the Administrator "shall approve" each submitted State plan, adopted after reasonable notice and hearing, which meets the following eight specified criteria:

> (A) (i) In the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . . and (ii) in the case of a plan implementing a national secondary ambient air quality standard it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitation . . . and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard . . .
>
> (C) it includes provision for establishment and operation of appropriate . . . procedures necessary to (i) monitor, compile, and analyze data on ambient air quality . . .
>
> (D) it includes a procedure . . . for review . . . of the location of new sources . . .
>
> (E) it contains adequate provisions for intergovernmental cooperation . . .
>
> (F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment . . . (iii) for periodic reports . . .

> (G) it provides . . . for periodic inspection and testing of motor vehicles . . . and
>
> (H) it provides for revision . . . as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard. . . . § 110(a)(2)(A)-(H).

If the State implementation plan does not meet these requirements, the Administrator is required to disapprove the plan and prepare regulations setting forth the implementation plan for the State. § 110(c)(1).

B. History of the Proceedings.

On April 30, 1971, the Administrator promulgated national primary and secondary ambient air quality standards. 36 Fed. Reg. 8186, 40 C.F.R. Part 50. Under the timetable set by the Act, the States were then required to submit to the Administrator their implementation plans by January 31, 1972, and the Administrator was required to approve or disapprove these plans by May 31, 1972.

On November 25, 1971, the EPA published "Requirements for Preparation, Adoption and Submittal of Implementation Plans." 36 Fed. Reg. 22398, 40 C.F.R. Part 51. In areas where the air quality was superior to national primary and secondary standards those requirements permitted implementation plans to allow for emissions into the ambient air up to secondary standards. 40 C.F.R. § 51.12(b). In February, 1972, Administrator Ruckelshaus testified before a Congressional Subcommittee that he would approve any State implementation plan that met the eight specified criteria of § 110(a)(2), none of which required the prevention of significant deterioration. *Hearings on Im-*

plementation of Clean Air Act Amendments of 1970 Before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 92d Cong., 2d Sess. Part 1, 246-249, 271-276 (1972).

On May 24, 1972, the Sierra Club and others filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that "the Administrator's policy to approve state implementation plans which allow for significant deterioration of existing air quality" would violate the Clean Air Act. Sierra Club further sought a preliminary injunction to enjoin the Administrator from approving any State plan that did not provide for nondeterioration. On May 30, 1972, District Judge John H. Pratt held a hearing to consider the motion for a preliminary injunction, and at the conclusion of the hearing Judge Pratt granted the motion. On June 2, 1972, Judge Pratt issued an opinion, *Sierra Club* v. *Ruckelshaus,* 344 F.Supp. 253 (D.D.C. 1972), to accompany his grant of preliminary injunctive relief. The decision was affirmed by the Court of Appeals for the District of Columbia Circuit, 4 ERC 1815 (per curiam) (unreported in U.S. App. D.C. and F.2d) "on the basis of the opinion filed June 2, 1972, by the District Court (John H. Pratt, District Judge)," and by an equally divided Supreme Court, *sub nom. Fri* v. *Sierra Club,* 412 U.S. 541 (1973).[4]

In the only judicial opinion prior to the promulgation of the significant deterioration regulations, the

[4] Affirmance by an equally divided Court is "without force as precedent." *Eaton* v. *Price,* 364 U.S. 263, 264 (1960) (opinion of Brennen, J.). *See also, United States* v. *Pink,* 315 U.S. 203, 216 (1942).

district court stated that it based its decision on the belief that a general purpose subsection of "the Clean Air Act of 1970, the legislative history of the Act and its predecessor, and the past and present administrative interpretation[s] of the Acts" imposed a nondeterioration requirement on State plans. 344 F.Supp. at 256.

In response to the district court's preliminary injunction, the Administrator disapproved all State implementation plans "to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is now better than the secondary standards." 40 C.F.R. § 52.21, 37 Fed. Feg. 23836-37 (Nov. 9, 1972). The Administrator promised to publish, "as soon as possible, proposed regulations setting forth appropriate requirements for modification of State implementation plans." 37 Fed. Reg. 23836.

The first set of such proposed regulations appeared the following year. 38 Fed. Reg. 18986 (July 16, 1973) (A.91a-159a). The Administrator set forth four alternative proposals (the "air quality increment plan," "emission limitation plan," "local definition plan," and "area classification plan"), with a view toward issuing final regulations "under the Clean Air Act [that] would prescribe steps to be taken by the States." *Id.* at A.91a.

A year later, the Administrator reproposed the regulations which had previously appeared as the "area classification plan" alternative, and solicited further "comment on the detailed procedural and technical aspects prior to promulgation." 39 Fed. Reg. 31000

(Aug. 27, 1974). (A.160-205a)[5] Final regulations were revised on November 27, 1974, 39 Fed. Reg. 42514 (Dec. 5, 1974) (A.206a-246a), and were effective as of January 6, 1975. The regulations were revised on January 16, 1975 (40 Fed. Reg. 2802) (A.242a-245a), June 12, 1975 (40 Fed. Reg. 25004) (A.246a-283a) and September 10, 1975 (40 Fed. Reg. 42001) (A.284a-291a). The regulations appear at 40 C.F.R. §§ 52.01, 52.21.

Upon issuance of the final regulations, petitions for review were filed in the Court of Appeals for the District of Columbia Circuit and in five other courts of appeals (A.11a, 13a, 16a, 17a, 19a, 22a, 26a, 28a, 31a, 32a). All petitions not in the Court of Appeals for the District of Columbia Circuit were transferred to that circuit and consolidated. The various petitioners challenged the regulations from several perspectives. In brief, challenges were made alleging:

—that the regulations were unauthorized by the Clean Air Act;

—that the regulations' grant of redesignation power to Federal land managers and Indian governing bodies abrogated the authority vested in the States by the Clean Air Act;

—that the regulations failed to prevent significant deterioration of existing clean air;

—that the promulgation of the regulations was procedurally defective;

—that the increments established by the regulations were arbitrary and capricious; and

—that the regulations were unconstitutional.

[5] The Administrator explained that a reproposal was necessary "due to the lack of precise direction either in the Clean Air Act or in the [District] Court order" regarding the implementation of a significant deterioration policy. (A. 165a).

The court of appeals rejected all challenges to the regulations and upheld the regulations in their entirety. (A.39a). Of the two issues presently before this Court, the court of appeals reached the merits only on the issue of whether the regulations were authorized by the Clean Air Act. Addressing that issue, the lower court ruled that two recent decisions[6] of this Court were not controlling, (A.65a-66a), and that a general purpose section, the legislative history and the administrative interpretation of the Clean Air Act imposed a nondeterioration policy on State implementation plans. (A.54a-67a). The lower court declined to address the issue of whether the authority granted to Federal land managers and Indian governing bodies to redesignate lands independent of State control abrogated the authority granted to the States by the Clean Air Act, finding that issue "not yet ripe for review." (A.86a).

C. The Prevention of Significant Deterioration Regulations.

In broad outline, the regulations are designed to prevent significant deterioration by controlling sulfur dioxide and particulate matter emissions from designated new and modified stationary sources in all States where air quality existing during 1974 was better than primary and secondary ambient standards. 40 C.F.R. § 52.21(c)(1). There are three "areas" established by the regulations: Class I, Class II, and Class III. Increases in pollutant concentrations in areas designated either Class I or Class II are specifically limited, while increases in Class III areas are allowed up to secondary standards. § 52.21(c)(2). The regulations desig-

[6] *Train* v. *Natural Resources Def. Council*, 421 U.S. 60 (1975); *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976).

nate the entire nation as Class II, § 52.21(c)(3)(i), but provide a procedure whereby the States can propose to redesignate areas to any class; Federal land managers can propose to redesignate any Federal lands only "to a more restrictive designation," *i.e.,* Class I; and whereby Indian governing bodies can propose to redesignate Indian lands to any class. § 52.21(c)(3)(ii), (iv), (v).

SUMMARY OF ARGUMENT

The Clean Air Act Amendments of 1970 sought to remedy deficiencies of earlier anti-pollution enactments by providing for the establishment of detailed air quality and new source performance standards, emission limitation, enforcement mechanisms, precise deadlines, and a clear distribution of Federal and State responsibilities for combatting air pollution that was lacking in prior air pollution legislation.

Secton 108(a)(1) provides that: "[f]or the purpose of establishing national primary and secondary ambient air quality standards," the Administrator is directed to list each air pollutant which, among other requirements, he has judged to have an "adverse effect on public health or welfare." Section 109 directs the Administrator to establish national primary and secondary ambient air quality standards for the listed air pollutants; primary standards are defined as those standards which, "allowing an adequate margin of safety, are requisite to protect the public health," while secondary standards are those standards "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence" of the listed air pollutant. Each State is required to adopt a plan to implement, maintain, and

enforce the national primary and secondary standards. § 110. An implementation plan must meet eight criteria, foremost of which is that "it provides for the attainment of [the] primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan" and that it "specifies a reasonable time" for the attainment of the secondary standard. § 110(a)(2)(A). "For purposes of developing and carrying out implementation plans under section 110," the entire geographic area of each State is designated an air quality control region. § 107. Section 111 limits the emissions of air pollutants from designated new stationary sources by requiring application "of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." A designated new stationary source is a source the Administrator has determined "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare." § 111(b)(1)(A).

Congress enacted these provisions to achieve one of the basic purposes of the Clean Air Act, namely "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." § 101(b)(1). At the same time, Congress has declared that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." § 101(a)(3). Thus, while establishing eight specific criteria a State implementation plan must satisfy in order to attain, maintain and enforce the national ambient air quality standards, § 110(a)(2)(A)-(H), Congress has directed the Administrator that he "shall approve" a State plan that meets these eight criteria and procedural requirements. Con-

gress further provided, in § 116 of the Act, that a State may choose to impose stricter standards than the national standards, but it nowhere *required* the States to prevent the deterioration of air which is cleaner than the national standards.

Despite its acknowledgement that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act," (A.46a-47a) the lower court upheld EPA's regulations that imposed such a nondeterioration requirement upon State implementation plans. In so doing, the lower court ignored the teaching of three recent decisions of this Court—*Train* v. *Natural Resources Def. Council,* 421 U.S. 60 (1975), *Hancock* v. *Train,* 426 U.S. 167 (1976) and *Union Electric Co.* v. *EPA,* 427 U.S. 246 (1976)—disregarded the plain language of § 110(a)(2) of the Act which mandates EPA approval of State implementation plans that satisfy the eight specified criteria of § 110, and based its decision entirely on the phrase "protect and enhance" contained in a purpose clause § 101(b)(1)), bits and pieces of pre-1970 administrative regulations and a two sentence passage from the 1970 Senate report which does not mention either the purpose clause or pre-1970 administrative regulations.

If the Court holds that the Clean Air Act does authorize EPA to promulgate the significant deterioration regulations, it should also hold that the provisions which grant to Federal land managers and Indian governing bodies the power to redesignate Federal and Indian lands violate the Clean Air Act and disrupt the Federal-State relationship so carefully established by the Act. Those provisions permit Federal land managers and Indian governing bodies to redesignate Federal and Indian lands independent of State control. Because of the extraterritorial reach of a redesignation, Federal land managers and Indian governing bodies are able to "dictate" land use 60-100 miles beyond Federal and Indian boundaries. In the western States in particular, where extensive Federal and Indian land ownership prevails, the result is to give Indian governing bodies and Federal land managers the power to control land use within entire States. There is absolutely no statutory authority for such a result. To the contrary, the Act explicitly declares that "[e]ach State shall have the primary responsibility for assuring air quality within the *entire* geographic area comprising such State." § 107(a). Moreover, the regulations nullify the requirement of § 118 that "makes it the duty of federal facilities to comply with *state-established* air quality and emission standards." *Hancock* v. *Train,* 426 U.S. 167, 183 (1976) (emphasis supplied).

ARGUMENT

I.

A. Section 110 Requires The Administrator To Approve State Implementation Plans That Satisfy The Section's Eight Requirements Even Though The Plans Do Not Contain A Nondeterioration Policy.

Section 110(a)(2) provides that the "Administrator shall approve" a State implementation plan if it has been adopted after public hearings and if it satisfies eight specified criteria that are concerned with the "attainment" and "maintenance" of the national primary and secondary air quality standards promulgated by EPA.[7] Although the court below conceded

[7] The eight criteria, section 110(a)(2)(A)-(H), are set forth, *supra* at 4-5.

that none of the eight criteria "implies a nondeterioration standard" (A.55a), it nevertheless upheld the promulgation by EPA of regulations that require State implementation plans to contain provisions to prevent significant deterioration of air that is cleaner than the air quality required by the national standards. EPA's regulations were promulgated in response to an order issued by the lower court in the *Ruckelshaus* case, which rejected the Administrator's contention that he had no authority to disapprove State implementation plans that satisfied the eight specified criteria set forth in § 110(a)(2).

The statutory language is both direct and explicit —"The Administrator *shall* approve" (emphasis supplied). Statutory use of the word "shall" generally denotes a mandatory requirement, that is, commanding some act. *See Escoe* v. *Zerbst,* 295 U.S. 490 (1935); *Richbourg Motor Co.* v. *United States,* 281 U.S. 528 (1930). In three recent cases interpreting the Clean Air Act, this Court in discussing § 110(a)(2) stated that the "mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified." *Union Electric Co.* v. *EPA,* 427 U.S. 246, 252 (1976). *Accord, Hancock* v. *Train,* 426 U.S. 167, 170 (1976); *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 71 n. 11, 79 (1975). The lower court held that these three decisions were not controlling because "the [Supreme] Court did not address the issue" of nondeterioration. (A.64a). Although petitioners agree that those decisions did not *directly* address the nondeterioration issue, we believe those decisions are controlling on the issue of whether the mandatory "shall approve" language in § 110(a)(2) *requires* the Administrator to approve State implementation plans that meet the § 110(a)(2) criteria, even though the plans do not contain a nondeterioration provision.

The only statutory basis that the lower court cited to support its holding that the Clean Air Act "embodied" a nondeterioration requirement is § 101(b)(1),[8] which sets forth one of the Act's purposes. Yet, the lower court conceded that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act." (A.46a-47a). Moreover, in seeking to impose a specific requirement of nondeterioration upon § 110 implementation plans, the court below misconstrued § 101(b)(1), which declares that one of the basic purposes of the Act is:

> to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.[9]

---

[8] The lower court further sought to support its holding based on selected administrative interpretations of the 1967 Air Quality Act, 81 Stat. 485, and the legislative history of the Clean Air Act, *as amended.* Petitioners address these issues *infra* at 22-34.

[9] Even if § 101(b)(1) implies a nondeterioration concept as contended by the lower court (A. 46a-47a), it still can not impose such a requirement upon § 110 implementation plans. The law is settled that "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208." *MacEvoy Co.* v. *United States,* 322 U.S. 102, 197 (1944). *See also, Fourgo Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222 (1957). Section 110 is specific in its requirements. Section 101(b)(1), on the other hand, contains general language only. Moreover, where two statutory provisions conflict, the later in time is con-

Citing the legislative history of § 101(b)(1), the lower court held that the "protect and enhance" language expresses a policy of nondeterioration. (A.56a).[10] Such a construction of "protect and enhance" is reached by isolating those words not only from the rest of the Act, but from the remainder of the sentence. This violates the fundamental rule "that a section of a statute not be read in isolation from the context of the whole act." *Richards* v. *United States,* 369 U.S. 1, 11 (1962).

The "protect[ion] and enhance[ment]" of the air quality is for the express purpose of promoting "the public health and welfare and the productive capacity" of the Nation's population. Section 108 requires the Administrator to list and establish air quality criteria for air pollutants which in his judgment have "an adverse effect on public health or welfare."[11] And § 109 directs the Administrator to promulgate national primary and secondary air quality standards once he has established air quality criteria. National primary standards are defined as those which, "allowing an adequate margin of safety, are requisite to *protect the public health.*" § 109(b)(1) (emphasis supplied). National secondary standards are defined as those "requisite to *protect the public welfare* from any known or anticipated adverse effect" associated with the air pollutant. § 109(b)(2) (emphasis supplied).

---

trolling. *Adkins* v. *Arnold,* 235 U.S. 417, 421 (1914). Section 110 is later in time than § 101(b)(1), having been enacted as part of the 1970 Amendments to the Clean Air Act, whereas § 101(b)(1) was part of the Air Quality Act of 1967. *See infra* at 24-25.

[10] Petitioners discuss the legislative history of § 101(b)(1) *infra* at 24-25.

[11] Two other requirements must be met before an air pollutant can be listed. § 108(a)(1)(B)-(C).

The State implementation plans are to provide for the "implementation, maintenance, and enforcement" of the primary and secondary standards. § 110(a)(1). The first of the eight specified criteria for an implementation plan, § 110(a)(2)(A), requires that a State plan provide for "the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan" and for the attainment of the secondary standard within "a reasonable time."

The remaining provisions of § 110(a)(2) specifically detail the other criteria by which the States, in their implementations plans, are to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." And, as even the lower court recognized, the prevention of deterioration of air cleaner than the national standards is not among them. The foregoing construction of § 101(b)(1) and § 110(a)(2) is consistent with the "anatomy" and "structure" of the Act, *Train, supra,* 421 U.S. at 63, 86. However, the lower court's construction of § 101(b)(1) superimposes a ninth requirement—nondeterioration—upon § 110 State implementation plans. The court's construction conflicts with the mandatory language of § 110 which requires approval of State plans which meet the eight specified criteria. In cases of such conflict, the construction that would permit both provisions of the statute to stand should be employed. *United States* v. *Moore,* 95 U.S. 760 (1878). Since petitioners' construction of § 101(b)(1) "admits a reasonable construction which gives effect to all of [the Clean Air Act's] provisions," *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307 (1961), that construction should prevail.

B. The Prevention Of Significant Deterioration Regulations Are Inconsistent With Other Provisions Of The Clean Air Act.

Section 110(c)(1) provides that the Administrator shall "prepare and publish proposed regulations setting forth an implementation plan" for a State if—and only if:

> (A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,
>
> (B) the plan . . . submitted for such State is determined by the Administrator not to be in accordance *with the requirements of this section* [§ 110], or
>
> (C) the State fails . . . to revise an implementation plan as required [to achieve national primary or secondary ambient air quality standards]. . . . (emphasis supplied).

None of the three circumstances authorizes the Administrator to promulgate an implementation plan, or portion thereof, if a State plan fails to contain a requirement preventing the deterioration of air cleaner than the national standards. The district court in *Ruckelshaus* nonetheless ordered the Administrator to disapprove State plans that failed to contain nondeterioration provisions, and to promulgate amendments to those plans to incorporate regulations that would provide for prevention of significant deterioration.[12]

The regulations are likewise inconsistent with the Clean Air Act as amended by the Energy Supply and Environmental Coordination Act of 1974. 88 Stat. 246. That Act, designed to encourage stationary fuel-burning sources to convert from oil to coal, requires the Administrator to review State implementation plans to determine whether "such plans can be revised in relation to fuel burning stationary sources . . . without interfering with the attainment and maintenance of any national ambient air quality standard." § 110(a)(3)(B). If a plan can be revised, the State shall be so notified and "[a]ny plan revision which is submitted by the State shall . . . be approved by the Administrator if the revision relates only to fuel burning sources . . . and the plan as revised complies" with § 110(a)(2). Again, the Administrator has no discretion in approving or disapproving a revised plan—if the revised plan complies with the eight criteria of § 110(a)(2) and the other general requirements of the subsection the Administrator "shall" approve the plan. *Train* v. *Natural Resources Def. Council, supra,* 421 U.S. at 65. Moreover, the limitation Congress imposed on a revision to a State implementation plan is that it not interfere "with the attainment and maintenance of any national ambient air quality standard." § 110(a)(3)(B). Revisions are not limited by a requirement of nondeterioration. The court below asserted that conversion to coal "certainly will impair both improvement and maintenance of air quality" but stated that "there is no reason to believe that passage of ESECA was intended to eliminate the requirement of nondeterioration." (A.66a). The fallacy of this argument, of course, is that it assumes there is a "requirement" of nondeterioration.

The lower court ignored completely the provisions of § 111 and its legislative history which demonstrate that Congress meant for the Federal government to focus on the prevention of new pollution prob-

[12] *See, e.g.,* 40 C.F.R. §§ 52.343 (Colorado), 52.683 (Idaho), 52.2346 (Utah), 52.2630 (Wyoming).

lems by the establishment of federal standards of performance for new (and modification of existing) sources. Yet, just a week prior to the decision of the court below, another panel of the District of Columbia Circuit concluded that "[T]he Clean Air Act, and *section 111 in particular,* was also designed to prevent new pollution problems, *especially the deterioration of air quality in areas where existing air quality levels exceed the promulgated air quality standards.*" *National Asphalt Pavement Association* v. *Train,* 539 F.2d 775, 783 (D.C. Cir. 1976) (emphasis supplied).

Section 111 directs the Administrator to establish federal standards of performance for new and modified stationary sources. Section 111 is applicable to stationary sources listed by the Administrator, the construction or modification of which are commenced after the publication of regulations prescribing a standard of performance.[13] A "standard of performance" means "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." § 111(a)(1).

That § 111 was the means chosen by Congress to prevent new pollution problems is evidenced in both the House and Senate reports accompanying the 1970 Amendments. The House reported that the provision for control over new stationary sources was enacted

[13] To date, the Administrator has listed 24 categories of stationary sources which are subject to the requirements of §111. 40 C.F.R. Part 60, Subparts D-AA. The construction or modification of fossil-fuel fired steam generators such as those operated by petitioners are subject to the requirements of § 111. 40 C.F.R. Part 60, Subpart D.

to "prevent the occurrence anywhere in the United States of significant new air pollution problems. . . ." H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 3 (1970). That view was shared by the Senate Committee, which concluded:

> The overriding purpose of this section would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 16 (1970).[14]

Section 111 reflects the dual objective of preventing air pollution, without at the same time unduly inhibiting economic growth. Thus, § 111 balances competing interests so as to best attain the general purpose set forth in § 101(b)(1) of promoting "public health and welfare *and* the productive capacity" of the Nation's population. Emissions of air pollutants are minimized by employing the "best system of emission reduction," while at the same time economic development and growth are not altogether prohibited. This is the means chosen by Congress to prevent new pollution problems. By contrast, the significant deterioration regulations impose an absolute prohibition against construction or modification of a source if it will violate an air quality increment in a designated area. 40 C.F.R. § 52.21(d)(2)(i).

Moreover, consistent with the principle "that the prevention and control of air pollution at its source

[14] And the Senate committee in the general statement of its report stated: "Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2 (1970).

is the primary responsibility of States and local governments," §101(a)(3),[15] Congress preserved the States' freedom, in §116, to impose a more stringent "standard or limitation respecting emissions of air pollutants." Thus, §116 leaves to the individual States the management of economic growth as limited by the national primary and secondary ambient air quality standards. If a nondeterioration policy is to be imposed, it is to be done by the individual States, and not by the Federal government.

On its face, the Act is explicit in its standards and requirements. Nowhere in the Act is a nondeterioration policy such as that imposed by the significant deterioration regulations authorized. Those regulations contravene the directives of the Act. Although the Act is so clear and unequivocal that it presents a classic justification for not resorting to its underlying legislative history, *see, e.g., United States* v. *Oregon,* 366 U.S. 643, 648 (1961), an examination of the legislative history is in order since the lower court found, "in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards." (A.55a). As we show below, the legislative history does not in fact provide the support necessary to validate the significant deterioration regulations promulgated by the Administrator.

C. The Legislative History Of The Clean Air Act Does Not Support The Significant Deterioration Regulations.

The lower court acknowledged that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act." (A.46a-47a). It nonetheless upheld the Administrator's promulgation of significant deterioration regulations because the court found, "in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a *pre-existing policy* of nondeterioration of air cleaner than the national standards." (A.55a) (emphasis supplied). Having discovered this "pre-existing policy" and finding "no support for the proposition that *the addition of Section 110(a)(2)* was intended to limit that policy in any way" the lower court reaffirmed its prior *per curiam* decision in *Sierra Club* v. *Ruckelshaus. Id.* (emphasis supplied).

The lower court nowhere explained how there could be a "pre-existing policy of nondeterioration of air cleaner than the national standards" since there were no national ambient air quality standards or legislation requiring the setting of national standards prior to the Clean Air Act Amendments of 1970. Nor did the lower court explain the significance, if any, of its characterization of §110(a)(2) as merely an "addition" to the Clean Air Act of 1970. The "national standards" to which the court referred to support its premise of a "pre-existing [i.e., pre-1970] policy" of nondeterioration were likewise "additions" enacted as part of the 1970 Amendments to the Clean Air Act. In short, contrary to the conclusion of the lower court —a conclusion which is at the core of its decision upholding the validity of the nondeterioration regulations —there could not have been a "pre-existing policy of nondeterioration of air cleaner than the national standards" because such standards simply did not exist

[15] "The Amendments place the primary responsibility for formulating pollution control strategies on the States." *Union Electric Co.* v. *EPA, supra,* 427 U.S. at 256.

prior to the Clean Air Act of 1970.[16] The fact is, and examination of the legislative history of the Act reveals, that a policy of nondeterioration of air cleaner than the national standards has never been embodied in the Clean Air Act.

The legislative history of § 101(b)(1)—the only statutory provision the lower court cited in support of its decision to uphold the significant deterioration regulations—does not express a policy of nondeterioration. Because the court below relied so heavily on the § 101(b)(1) phrase "protect and enhance," it is illuminating to trace the origins of that language.

In the Clean Air Act of 1963, 77 Stat. 392, Congress declared that a purpose of the Act was "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . ." 77 Stat. 393.[17] Section 5 of the 1963 Act sought to achieve that general purpose by authorizing the Attorney General to sue for the abatement of "pollution of air which is endangering the *health or welfare* of persons in a State or States other than that in which the discharge or discharges . . . originate." 77 Stat. 396-398 (emphasis supplied).

The phrase "and enhance the quality of" was added after the words "to protect" by the Air Quality Act of 1967. 81 Stat. 485. This phrase reflected the 1967 Amendments' prime purpose, which was "to strengthen the Clean Air Act . . . and to enhance the quality of the atmosphere to protect the health and welfare of [the] citizens against long-term hazards and immediate danger." S. Rep. No. 403, 90th Cong., 1st Sess. 2 (1967).

[16] The 1967 Air Quality Act directed each *State* to adopt ambient air quality standards applicable to any designated air quality control region. 81 Stat. 491.

[17] Thus, the lower court is not quite accurate when it states that the " 'protect and enhance' language of the Clean Air Act was added by the Air Quality Act of 1967." (A.55a).

One means by which the 1967 Amendments sought to strengthen the Clean Air Act of 1963 was the designation of "air quality control regions." But air quality control regions did *not* include clean air areas. Rather, they were confined to those areas deemed "necessary for the establishment of air quality standards to protect public health and welfare." H. R. Rep. No. 728, 90th Cong., 1st Sess. 33 (1967). *See also,* S. Rep. No. 403, 90th Cong., 1st Sess. 25 (1967). Air quality control regions were "those communities which, because of the extent of urbanization and industrialization, meteorological factors, and so on, are affected by a common air pollution problem requiring conformity of action." H. R. Rep. No. 728, 90th Cong., 1st Sess. 15 (1967). Moreover, if "an area is not now a problem area," it is only in the event that "the air quality . . . *deteriorates below the level required to protect the public health and welfare*" that the Department of Health, Education and Welfare would be "required to designate that region for the establishment of air quality standards. . . ." S. Rep. No. 403, *supra* at 4 (emphasis supplied).

Ignoring the air quality control region and protection of health and welfare concepts that were integral parts of the 1967 Act, the court below declared that the "administrative interpretation and, to a lesser degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration." (A.56a). The authorities noted by the court below (A.56a, n. 30), in

fact provide no support for a "policy of nondeterioration" that relates to air cleaner than the national standards, which is the issue in this case.

The court below stated that the National Air Pollution Control Administration of HEW, which administered the *1967* Act, "formalized the concept of nondeterioration" in its Guidelines for the Development of Air Quality Standards and Implementation Plans. (A.56a, n. 30). To support this statement the court quoted the following language:

> [A]n explicit purpose of the [1967] Act is to '*protect* and *enhance* the quality of the Nation's air resources' (emphasis added by the court). Air quality standards which, even if fully implemented, would result in *significant deterioration* of air quality *in any substantial portion of an air quality control region* clearly would conflict with this expressed purpose of the law. (emphasis supplied).

Since, under the 1967 Act, *only* an area with air pollution problems was designated an "air quality control region" and since in the quoted statement "significant deterioration" related specifically to an air quality control region, the so-called "formalized" "concept of nondeterioration" did not refer at all to areas where the air is clean, much less to air cleaner than the "national standards" which were not yet in being. To the contrary, the Guidelines were specifically addressing the establishment of the air quality standards for air quality control regions, which, under the 1967 Act, were those areas where air quality had already reached levels that endangered the health or welfare of persons affected. Thus, as Senator Muskie explained the 1967 Act on the Senate floor, the "fact that an area is not

now a problem area will not mean that controls will never be required. *When the air quality of any region deteriorates below the level required to protect public health and welfare*, the Secretary is required to designate that region for the establishment of air quality standards enforceable by the Federal Government if the States fail to act." 113 Cong. Rec. 19172 (July 18, 1967) (emphasis supplied).

The court ignored this explanation and cited instead an isolated portion of another statement by Senator Muskie "for the proposition that it was necessary 'to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future.'" (A.56a, n. 30). But, the sentence in its entirety and the subsequent sentence state:

> We must define the steps necessary to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future. And recognizing the importance of the economic-technological-environmental relationship we must develop the requisite framework to implement the desired goals. S. Rep. No. 403, 90th Cong., 1st Sess. 8-9 (1967).

The "steps" and "framework" referred to by Senator Muskie and established by Congress in the 1967 Amendments were designed to abate air pollution in "air quality control regions" where, because of "urban-industrial concentrations, and other factors" (§ 107(a)), the air quality "endangers the health and welfare of . . . persons" (§ 108(a)). 81 Stat. 491. There was absolutely no provision in the 1967 Amendments that established a nondeterioration policy for high quality ambient air areas. Indeed, "deterioration" was only discussed in the context of the air quality control

regions in the 1967 Act and the ambient air quality levels necessary to protect "the public health and welfare." And the 1970 Clean Air Act Amendments specifically embraced the "health and welfare" concept in the Act's operative provisions by requiring the Administrator of EPA: (1) to establish national primary standards requisite to protect public health; (2) to establish national secondary standards requisite to protect the public welfare; and (3) to approve State implementation plans which meet the eight specified statutory criteria designed to achieve the national primary and secondary standards within the required time frames established in the Act.

The lower court cited excerpts of testimony of HEW Secretary Finch and Undersecretary Veneman from the Senate hearings on the 1970 Clean Air Act Amendments which the court believed expressed "their clear understanding that the 'protect and enhance' language of Section 101 mandated the policy of nondeterioration." (A.56a).

The lower court quoted two paragraphs of Secretary Finch's prepared testimony. The first quoted paragraph points out that States "would have the *option* of designing their implementation plans to achieve or preserve higher than national [air] quality levels, *if they wished to do so.*" (A.57a) (emphasis supplied). This statement is completely consistent with the provisions ultimately enacted in § 116 of the 1970 Act and totally inconsistent with the court's conclusion that the Administrator of EPA has authority to *require* the States to prevent the deterioration of air cleaner than the national standards.

The second quoted paragraph from Secretary Finch's prepared testimony—that "it has been and

will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the ['protect and enhance'] provision" and that "[w]e shall continue to expect States to maintain air of good quality where it now exists" *Id.*—is at best equivocal. But whatever its meaning, an earlier paragraph in the Secretary's statement—which the lower court did not cite—unequivocally declared that "[t]he provisions for national air quality standard-setting would not impair any State's right to establish standards requiring higher levels of air quality. This right is stated as a national policy in section 109 [presently § 116] of the Clean Air Act, and there would be no change in this policy." (*Air Pollution—1970,* Hearings before the Subcommittee on Public Works, Part I, 132 (1970)). And that declaration, the substance of which was repeated in the first paragraph of the Secretary's statement quoted in the lower court's opinion and as well by Undersecretary Veneman,[18] is wholly at odds with

---

[18] Undersecretary Veneman, who submitted Secretary Finch's written statement, also declared that

> The provisions for national air quality standard setting would not impair any State's right to establish standards requiring higher levels of air quality.
>
> I think we should particularly emphasize that point, that this right is stated as a national policy in the Clean Air Act, and it is a right that we affirm. *Air Pollution—1970, supra* at 143.

Again, the lower court ignored this portion of the Veneman testimony and quoted instead another portion of his extemporaneous statement which essentially repeated the second paragraph of Secretary Finch's prepared testimony relied upon by the lower court. The Veneman language relied upon by the lower court is, like the similar Finch language, ambiguous, contrary to the explicit recog-

the notion that the States are *required* to prevent deterioration of air cleaner than the national standards —especially in light of the lower court's recognition that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act." (A.46a-47a). But Congress did expressly provide the States with the *option* in § 116 to establish standards demanding higher levels of air quality than the national, federally-established standards, and it is that option which the lower court has withdrawn from the States, solely on the basis of its view of portions of legislative history.

Finally, the court below attempted to uphold the validity of the significant deterioration regulations by citing two sentences in the 1970 Senate report, (A.57a-58a):

> In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

The court below treated this report language as a "nondeterioration mandate" (A.59a), and concluded

---

nition of both men and contrary to the explicit provisions of the 1970 Clean Air Act Amendments that it is for the *States*—and not the EPA Administrator—to decide whether to establish air quality standards more stringent than the national primary and secondary standards.

that, by contrast, "there was no particular significance ascribed to the 'shall approve' language of the section which became Section 110(a)(2)." (A.58a). On the contrary, petitioners suggest the "particular significance" to be "ascribed to the 'shall approve' language of § 110(a)(2) is that it indeed became law with the passage of the 1970 Amendments to the Clean Air Act. And, as this Court made clear in *Train* v. *Natural Resources Def. Council, supra,* 421 U.S. at 79, "the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards . . ." (emphasis in original). On the other hand, the "nondeterioration mandate contained in the Senate report," to which the lower court refers, is nowhere set forth in the Clean Air Act in *any* form, much less as a "mandate" to the States.

Apart from this vital difference between a "mandate" presumably contained in a Senate report and the "mandate" actually set forth in § 110(a)(2) of the Clean Air Act of 1970, the fact is that the two sentences which the lower court characterized as a "nondeterioration mandate" falls far short of justifying the conclusion that the Federal government was thereby authorized to *require* sovereign States to prevent the deterioration of air cleaner than the national standards. In the first place, neither sentence mentions the "protect and enhance" language of the § 101(b)(1) purpose clause of the Act repeatedly referred to by the lower court as the sole statutory basis for a nondeterioration policy. Furthermore, if there were indeed a "pre-existing policy of nondeterioration of air cleaner than the national standards" as the lower court found from its reading of the "legislative history

of the Clean Air Act of 1970," (A.55a), certainly that policy would have surfaced in the only two sentences in the Senate report the court below could find to support its "nondeterioration mandate" conclusion. Yet, such a "pre-existing policy" is nowhere described or referred to in either sentence. To the contrary, the language speaks prospectively of the establishment of "national *goals.*" Even then, the quoted language *suggests,* it does not *mandate,* disapproval of State implementation plans—"the Secretary *should* not approve." And that suggestion is itself further qualified in two respects—first, it relates to an implementation plan "which does not provide, *to the maximum extent practicable,* for the continued maintenance of such ambient air quality" (emphasis supplied). Secondly, the suggestion refers to the situation "[o]nce such national goals are established"—i.e., once the federally established levels of air quality are set—"deterioration of air quality *should* not be permitted except where there is no available alternative." (emphasis supplied). It would seem that this language refers to maintaining air quality at the federal standards, once achieved, particularly in light of the very next sentence in the Senate report, which states as follows:

> Given the varying alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic control—deterioration need not occur. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

Although the lower court held that "there was no particular significance ascribed to the 'shall approve' language" of § 110(a)(2) (A.58a), the legislative history of § 110 makes it quite clear that Congress knew what it was saying and meant what it said by inclusion of the "shall approve" language.

The Senate report stated that the Administrator "shall approve" a State plan if it meets designated criteria, none of which expressed a nondeterioration policy. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 55 (1970). The House report declared that a State plan "will be applied" if the Administrator determines that the plan meets four requirements, none of which expressed a nondeterioration policy. H. R. Rep. No. 91-1146, 91st Cong., 2d Sess. 8 (1970). And the Conference report, in summarizing the Senate and House bills, stated that under the House bill the Administrator "was to approve" a plan if it met the listed requirements, and under the Senate bill the Administrator "was required to approve" a plan that met the listed requirements. H. R. Rep. No. 91-1783, 91st Cong., 2d Sess. 45 (1970). The language is consistent in its mandatory tone requiring the Administrator to approve plans that meet the designated criteria of § 110. Nowhere is there language permitting, much less requiring, the Administrator to disapprove a State plan for failure to include a nondeterioration requirement.[19]

Thus, neither the language of the Clean Air Act nor its legislative history, supports a policy of nondeteri-

---

[19] The lower court concluded that it was "significant . . . that recent congressional statements have supported the historic existence of a requirement of nondeterioration." (A.61a). Quite the contrary, though, it is not significant, for the "views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress. *Haynes* v. *United States,* 390 U.S. 85, 87 n. 4 (1968).

oration. The legislative history of §110(a)(2) and the enacted language demonstrates that Congress knew how to create a mandate when it wanted a mandate. The disapproval by the Administrator of State plans for failure to contain a nondeterioration policy and the subsequent promulgation of the significant deterioration regulations violate the Clean Air Act.

II.

A. The Regulatory Provisions Violate The Clean Air Act Insofar As They Authorize Federal Land Managers And Indian Governing Bodies To Redesignate Federal And Indian Lands Independent Of State Control.

The question whether the Clean Air Act empowers the Environmental Protection Agency to grant Federal land managers and Indian governing bodies authority to redesignate Federal and Indian lands need not be reached if the Court holds that the regulations are invalid in their entirety, as we urge in Part I, *supra*. If the Court holds that a nondeterioration policy is authorized by the Clean Air Act, the second issue emerges: whether the Act authorizes Federal land managers and Indian governing bodies to redesignate Federal and Indian lands independent of State control.

1. The Redesignation Provisions.

The prevention of significant deterioration regulations initially designated all applicable areas as Class II. 40 C.F.R. §52.21(c)(3). Redesignation of these areas may be proposed by the States, Federal land managers, or Indian governing bodies, subject to approval by the Administrator. *Id.*

A State may propose to redesignate an area within its boundaries to either a Class I or Class III designation provided certain procedural prerequisites are followed.[20] 40 C.F.R. §52.21(c)(3)(ii). Where Federal lands are located within a State, that State may propose to redesignate those lands so long as the redesignation is consistent with adjacent State and privately owned lands, and the redesignation is proposed after consultation with the Federal land manager. 40 C.F.R. §52.21(c)(3)(iii).

However, a Federal land manager may propose to redesignate any Federal lands to a "more restrictive designation than would otherwise be applicable" provided that he follows procedures "equivalent to those required of States" and that the redesignation is proposed after consultation with the State(s) in which the Federal land is located or which borders the Federal land. 40 C.F.R. §52.21(c)(iv).[21]

Moreover, an Indian governing body may propose to redesignate to either a Class I or Class III designation the lands over which it has jurisdiction provided that it follows procedures equivalent to those required of the States and that it consults with the State(s) in which the lands are located or border. 40 C.F.R. §52.21(c)(v). For Indian lands held in trust, the redesigna-

---

[20] Those prerequisites are: that at least one public hearing be convened, 40 C.F.R. § 52.21(c)(3)(ii)(a); that neighboring States be notified at least 30 days prior to the public hearing, 40 C.F.R. § 52.21(c)(3)(ii)(b); that a discussion of the reasons for the redesignation be made available for public inspection at least 30 days prior to the hearing, 40 C.F.R. § 52.21(c)(3)(ii)(c); and that the redesignation be based on the record of the State's hearing, 40 C.F.R. § 52.21(c)(3)(ii)(d).

[21] Federal land managers may not propose to redesignate Federal lands to the more lenient Class III designation.

tion must have the approval of the Secretary of the Interior. 40 C.F.R. § 52.21(c)(v)(b).

The regulations further provide that the Administrator shall approve any redesignation proposed by a State, Federal land manager, or Indian governing body so long as the prescribed procedural requirements have been met and provided that the redesignating entity has not "arbitrarily and capriciously" disregarded the area's anticipated growth, the "social, environmental, and economic effects" of the redesignation upon the area and "upon other areas and States," and the redesignation's impact upon "regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi).[22] In the event a State or Indian governing body protests a proposed redesignation, the Administrator may approve it only if he determines in his "judgment," that the redesignation "appropriately balances" the "considerations" quoted above.

As we show below, these regulations encroach upon the primary role reserved to the States under the Clean Air Act for controlling air pollution within their entire geographic areas.

2. The Clean Air Act Explicitly Grants The States The Primary Responsibility For Controlling Air Quality Throughout Their Entire Geographic Areas.

Even though Congress "took a stick to the States," *Train* v. *Natural Resources Def. Council, supra,* 421 U.S. at 64, with the passage of the Clean Air Amend-

[22] A State redesignation proposal will not be approved unless the State has requested and been delegated by EPA the responsibility for carrying out preconstruction review of new sources in accordance with provisions of the regulations. § 52.21(c)(3)(vi)(a)(3).

ments of 1970, it explicitly provided that, "[e]ach State shall have the primary responsibility for assuring air quality *within the entire geographic area comprising each State. . . .*" § 107(a) (emphasis supplied). Congress also declared, in § 101(a)(3), that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." This Court has recognized that "the primary responsibility for formulating pollution control strategies [is] on the States. . . ." *Union Electric Co.* v. *E.P.A.,* 427 U.S. 246, 256 (1976). *Accord, Hancock* v. *Train,* 426 U.S. 167, 181 (1976).

Despite the clarity of § 101(a)(3) and § 107(a) of the Act in this regard, the Administrator attempted to justify his withdrawal of the States' authority and his grant of powers to the Federal land managers and Indian governing bodies in the following terms:

> This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States, 39 Fed. Reg. 42513 (Dec. 5, 1974). (A.222a).

This Court recently had occasion to construe § 118 of the Clean Air Act in *Hancock* v. *Train,* 426 U.S. 167 (1976). That section of the Act directs federal facilities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution *to the same extent that any per-*

son is subject to such requirements" (emphasis supplied). And although the Court held that § 118 does not require existing federal facilities to obtain State permits in order to continue operations, it acknowledged that § 118 of the Clean Air Act "makes it the duty of federal facilities to comply with *state-established* air quality and emission standards." *Hancock* v. *Train, supra,* 426 U.S. at 183 (emphasis supplied).

The Court pointed out:

> There is agreement that § 118 obligates existing federal installations to join nonfederal sources in abating air pollution, that comparable federal and nonfederal sources are expected to achieve the same levels of performance in abating air pollution, and that *those levels of performance are set by the States. Id.* at 182-183. (emphasis supplied).

The regulations, by empowering Federal land managers to redesignate Federal lands independent of State control, not only are contrary to the explicit provisions of § 101(a)(3) and § 107(a), they also are contrary to both the letter and the spirit of § 118, as interpreted by this Court in *Hancock*. By treating Federal land managers as *superior* to "any person" that is subject to State requirements, the regulations violate § 118's explicit directives that Federal land managers engaged in any activity which may result in the discharge of air pollutants be treated "the same" as "any person." And it is no answer that there is nothing in the Act "that indicates the Congress intended to preclude the Federal government from meeting more restrictive standards than are imposed by the States." There is much in the Act that makes it clear that it is for the *States* and *not* the Federal government to choose, if they wish, to impose standards more restrictive than the national standards, *e.g.,* §§ 116, 101(a)(3) and 107(a).[23]

In any event, it is clear from the Administrator's own description of the regulations' impact that far more power is delegated to the Federal land managers (and Indian governing bodies) than merely the opportunity to set *for themselves* "more restrictive standards than are imposed by the States." Indeed, under the regulations, Federal land managers and Indian governing bodies can substantially influence and even "dictate" land uses not only on Federal and Indian lands, but also on State, local and private lands.

This ability to control land use in surrounding areas was acknowledged by the Administrator upon promulgation of the final significant deterioration regulations:

> [B]ecause of the small *air quality increments specified for Class I areas,* these levels *can be violated by a source many miles inside an adjacent Class II or III area.* For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, *a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State.* Therefore, wherever a Class I area adjoins a Class II or III area, *the potential growth restrictions, especially for power plant*

[23] Since Indian governing bodies are not accorded preferential treatment under the Act, they also are subject to State requirements. A "general Act of Congress appl[ies] to Indians as well as to all others in the absence of a clear expression to the contrary." *Federal Power Com's.* v. *Tuscarora,* 362 U.S. 99, 120 (1960).

> *development, extends well beyond the Class I boundaries into the adjacent areas.* . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, *allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.* 39 Fed. Reg. 42512 (Dec. 5, 1974) (emphasis supplied). (A.218a-219a).

The "'Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality," January 1975, (R.93-211), mirrors the Administrator's view of December 5, 1974 that construction of a power plant in a Class II area can violate the Class I increment 60 miles away, (R. 127), and reaffirms that "permissible siting of new sources will be dictated by the adjoining Class I rather than the Class II or III increment" (R. 129).

Reference 15 to the Technical Support Document (EPA memo, Aug. 12, 1974) (R. 194) predicts that impact on Class I areas will be even greater:

> It should be noted that a power plant in the size ranges discussed here [1,000 MW] may endanger a Zone I increment for a distance of 80 miles downwind under poor dispersion condition. (R. 194).
>
> * * *
>
> [I]t was determined that a plant which just meets the Zone II increment, may exceed the Zone I increment for a distance as great as 80 miles downwind. Thus it appears that such a power plant should not be located any closer than 80 miles from the nearest Zone I boundary. *Id.* at 102.

And according to Reference 16 (EPA memo, Oct. 15, 1974) (R. 202-205),

> it can be concluded that it is reasonable to expect a 1,000 MW plant meeting NSPS to endanger the Zone I SO_2 increment to a distance of 50-60 miles downwind. For larger plants located for example in a Zone III area this increment will be endangered for greater distances downwind. (R. 203).

The consequences of a Class I area designation which makes it possible to "dictate" land use 60 and more miles away from the Class I border have severe ramifications regarding the control and planning of land use. For many western states, the impact of the regulations is that Federal land managers and Indian governing bodies are now able to occupy a primary, if not *the* primary role in controlling a State's land use. This usurpation of State land use control is exemplified in the four states—Utah, Idaho, Colorado and Wyoming—in which petitioners herein operate electric generating units. The figures in the table below show the far-reaching extent of Federal and Indian land holdings within the four states.

State	Federal Acreage [24]	Federal Lands As Percentage Of State	Indian Acreage [25]	Indian Lands As Percentage Of State	Federal & Indian Lands As Percentage Of State
Utah	34,882,460	66%	2,274,391	4%	70%
Colorado	23,973,450	36%	755,163	1%	27%
Wyoming	29,927,861	48%	1,886,329	3%	51%
Idaho	33,732,820	64%	795,419	1%	65%

[24] United States Department of Interior, Bureau of Land Management, *Public Land Statistics,* Table 7 (1975).

[25] United States Department of Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands,* Acreage as of September 30, 1976 (to be published).

The effect of these pervasive Federal and Indian land holdings is even more dramatic than the figures themselves indicate. In the western States especially, State and private lands are virtually engulfed by the Federal and Indian lands, as the U.S. Department of the Interior, Federal Lands Map vividly portrays. *See* Appendix C, *infra.* The significance of that fact for present purposes is that in such States, virtually all non-Federal or non-Indian lands are well within the 60-100 mile distance from Federal or Indian lands and would therefore be subject to the "drift factor" limitations described by EPA in the materials quoted above. Indeed, in the States of Utah and Idaho no point on State, local or private land is farther than 20 miles from a Federal or Indian land border.[26] Given the ability to "dictate" land use 60 or more miles beyond a particular Class I area, the redesignation process reposes in Federal land managers and Indian governing bodies the authority and power over State, municipal and private land use in virtually the entire States of Utah and Idaho and the entire western halves of the States of Colorado and Wyoming.

Any notion that this redesignation power of the Indian governing bodies and the Federal land managers is theoretical should be dispelled by the recent proposal of the Northern Cheyenne Tribal Council to redesignate the Northern Cheyenne Indian Reservation in Montana to Class I pursuant to EPA's regulations for prevention of significant deterioration. That

[26] Although Federal and Indian lands occupy a somewhat smaller percentage of total land area in Wyoming and Colorado than in Utah and Idaho, such holdings in Wyoming and Colorado are heavily concentrated in the western sectors of those two States. *See* Appendix C, *infra.*

redesignation proposal is the subject of a proposed EPA rule as to which interested parties have been invited to comment. 42 Fed. Reg. 21819 (April 29, 1977). In its discussion of the Cheyenne redesignation proposal EPA notes that:

> [I]t is likely that coal-fired power plants and coal conversion facilities would be impacted at least to the extent that their impact on the Class I increment would affect decisions on siting and pollution control equipment.
>
> The analysis submitted with the request predicts the impacts of several energy utilization scenarios on air quality levels on the reservation, and indicates that *facilities located near the reservation would violate the Class I increment within reservation borders. Id.* at 21820. (emphasis supplied).

EPA has expressed its "preliminary judgment" that in proposing redesignation of the Northern Cheyenne Indian Reservation to Class I, the Northern Cheyenne Tribal Council has "'not acted arbitrarily or capriciously in their action and have properly considered regional and national interests." *Id.* It is worth noting that although the Northern Cheyenne Indian Reservation is located within the State of Montana, the Governor of the State of Wyoming registered that State's opposition to the Cheyenne redesignation request "because it would predetermine the level of development possible in parts of Northern Wyoming. Several coal conversion plants are being seriously considered in that area. The decision as to whether or not these plants and other possible developments should be allowed is one that ought to be made by the people of Wyoming, not by persons in Montana nor Wash-

ington, D.C."[27] In short, the Northern Cheyenne Tribal Council's currently pending redesignation proposal is a realistic demonstration of the fact that EPA's regulations allow Federal land managers and Indian governing bodies to occupy roles in land use planning and decision-making that even EPA acknowledges "[t]raditionally . . . have been considered the prerogative of local and State governments." (39 Fed. Reg. 31001) (Aug. 27, 1974) (A.167a).

Thus, the powers granted by EPA's regulations to Federal land managers and Indian governing bodies not only violate the Clean Air Act, but they radically alter the Federal-State relationship governing land use without any legislative authority whatsoever.

---

[27] Letter from Governor Ed Herschler to Mr, Allen Rowland, President, Northern Cheyenne Tribe (Jan. 28, 1977), Appendix B, *infra*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the regulations held invalid in their entirety as unauthorized by the Clean Air Act. If this Court holds that the nondeterioration regulations are authorized by the Clean Air Act, it should declare invalid that portion of the regulations granting redesignation authority to the Federal land managers and Indian governing bodies as being in violation of the Clean Air Act.

Respectfully submitted,

COUNSEL FOR PETITIONERS

UTAH POWER & LIGHT COMPANY
PUBLIC SERVICE COMPANY OF COLORADO
COLORADO-UTE ELECTRIC ASSOCIATION, INC.
PLATTE RIVER POWER AUTHORITY
CHEYENNE LIGHT, FUEL AND POWER COMPANY

GERRY LEVENBERG
THOMAS A. KAROL

LEONARD, COHEN AND GETTINGS
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

UTAH POWER & LIGHT COMPANY

SIDNEY G. BAUCOM
VERL R. TOPHAM

P. O. Box 899
Salt Lake City, Utah 84110

PUBLIC SERVICE COMPANY OF COLORADO
CHEYENNE LIGHT, FUEL AND POWER COMPANY

BRYANT O'DONNELL

KELLY, STANSFIELD & O'DONNELL
550 Fifteenth Street
Denver, Colorado 80202

PLATTE RIVER POWER AUTHORITY

MOSES, WITTEMYER and HARRISON, P.C.
250 Arapahoe Avenue
Boulder, Colorado 80302

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

GIRTS KRUMINS

P.O. Box 1149
Montrose, Colorado 81401

APPENDIX

APPENDIX A

Relevant excerpts from the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are as follows:

§ 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . .

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . .

• • • •

§ 1857c—2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) For purposes of developing and carrying out implementation plans under section 110—

(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after

such date under subsection (c), shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

§ 1857c—3. [§ 108.] Air quality criteria and control techniques—Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

• • • •

§ 1857c—4. [§ 109.] National primary and secondary ambient air quality standards; promulgation; procedure

(a)(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard

and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such

air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

§ 1857c—5. [§ 110.] State implementation plans for national primary and secondary ambient air quality standards—Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c—4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine motnhs after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines

that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan, or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollu-

tants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c—6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within

such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to pesrmit the State to make a determination under clause (A).

Extension of period for submission of plan implementing national secondary ambient air quality standard

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to extend 18 months from the date otherwise required for submission of such plan.

Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator; transportation regulations study and report; parking surcharge; suspension authority

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

• • • •

§ 1857c—6. [§ 111.] Standards of performance for new stationary sources—Definitions

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

Publication and revision by Administrator of list of of categories of stationary sources; inclusion of category in list; publication of proposed regulations by Administrator establishing standards for new sources within category; promulgation and revision of standards; differentiation within categories of new sources; issuance of information on pollution control techniques; applicability to new sources owned or operated by United States

(b)(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute to the endangerment of public health or welfare.

• • • •

§ 1857d—1. [§ 116.] Retention of State authority

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857—6c (c)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

• • • •

§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities: compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. . . .

APPENDIX B

WYOMING
EXECUTIVE DEPARTMENT
CHEYENNE

ED HERSCHLER, *Governor*

January 28, 1977

Mr. Allen Rowland
President, Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, Montana 89043

Dear Mr. Rowland:

Regarding the Northern Cheyenne Air Quality Redesignation Report and Request, please be advised that the State of Wyoming is opposed to such redesignation because it would pre-determine the level of development possible in parts of Northern Wyoming. Several coal conversion plants are being seriously considered in that area. The decision as to whether or not these plants and other possible developments should be allowed is one that ought to be made by the people of Wyoming, not by persons in Montana nor Washington, D.C.

With our Industrial Siting Act and air quality regulations, we have the mechanisms to insure that the impacts from such projects will be minimized and, through previous decisions and policies, we have demonstrated our determination to enforce these laws.

Yours sincerely,
/s/ ED HERSCHLER
Ed Herschler

EH/alr

cc: Randolph Wood, Department of
Environmental Quality
Environmental Protection Agency
Washington, D.C.